

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

**FILED**

**NOV 24 2004**

**CATHY A. CATTERSON, CLERK  
U.S. COURT OF APPEALS**

PUBLIC UTILITIES COMMISSION OF  
THE STATE OF CALIFORNIA; et al.,

Petitioners,

v.

FEDERAL ENERGY REGULATORY  
COMMISSION,

Respondent.

Nos. 01-71051, 01-71321,  
01-71544, 02-70254, 02-70266,  
02-70269, 02-70275, 02-70282,  
02-70301, 02-72113, 03-73887,  
03-74252, 03-74527, 03-74531,  
03-74594, 03-74629, 04-73423,  
04-73501.

BONNEVILLE POWER  
ADMINISTRATION; et al.,

Petitioners,

v.

FEDERAL ENERGY REGULATORY  
COMMISSION,

Respondent.

Nos. 02-70262, 02-70270,  
02-70274, 02-70294, 03-70185.

PUBLIC UTILITIES COMMISSION OF  
THE STATE OF CALIFORNIA; et al.,

Petitioners,

v.

Nos. 01-71934, 01-71944,  
02-70070, 02-70217, 02-70219,  
02-70239, 02-70240, 02-70241,  
02-70263, 02-70264, 02-70265,  
02-70267, 02-70268, 02-70271,  
02-70277, 02-70285, 02-70287,  
02-70290, 02-70295, 02-70299,  
02-70307, 02-70327, 02-70329,

01-71051, et al., 02-70262, et al., 01-71934, et al.

FEDERAL ENERGY REGULATORY  
COMMISSION,

Respondent.

02-70358, 02-70379, 02-70380,  
02-71426, 02-71547, 02-71967,  
02-72123, 02-72134, 02-72136,  
02-72162, 02-72172, 02-72175,  
02-72451, 02-72453, 02-72458,  
02-72487, 02-72488, 02-72511,  
02-72528, 02-72529, 02-72530,  
02-72537, 02-72548, 02-72585,  
02-72794, 02-72795, 02-72797,  
02-72798, 03-70636, 03-74415,  
03-74464, 03-74471, 03-74526,  
03-74547, 03-74548, 03-74550,  
03-74582, 03-74590, 03-74592,  
03-74604, 03-74631, 03-74647,  
03-74653, 03-74654, 03-74655,  
03-74729, 03-74730, 04-70564,  
04-70637, 04-70684, 04-72162,  
04-72169, 04-72210, 04-73242,  
04-73405, 04-72539, 04-72756,  
04-73259, 04-73406, 04-73502,  
04-73517, 04-73549, 04-73551,  
04-73552, 04-73553, 04-74128,  
04-73491, 04-74703, 04-75822.

ORDER

Before: THOMAS, McKEOWN, and CLIFTON, Circuit Judges

(1) *Scope of Phase One*: For administrative ease, petitions 02-70262, 02-70270, 02-70274, 02-70294 and 03-70185 (“Jurisdictional Cases”), and petitions 01-71051, 01-71321, 01-71544, 02-70254, 02-70266, 02-70269, 02-70275, 02-70282, 02-70301, 02-72113, 03-73887, 03-74252, 03-74527, 03-74531, 03-74594, 03-74629, 04-73423 and 04-73501 (“Scope/Transactions Cases”), are severed from the remainder of the above-captioned cases. The two sets of newly consolidated

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cases shall be briefed separately; the covers of the briefs shall state whether they are filed in the Jurisdictional Cases or in the Scope/Transactions Cases.

Proceedings in the remainder of the consolidated cases 01-71934, et al., are stayed pending further order of the court.

(2) Reservation of Rights: To the extent the Jurisdictional Cases raise any issues other than the Commission's jurisdiction to order refunds from municipal/governmental entities, those issues are severed from petitions 02-70262, et al., without prejudice to the parties raising the issues in the petitions that have been stayed, provided the issue(s) have been properly preserved in the stayed petition(s). To the extent the Scope/Transactions Cases raise any issues other than the time period within which refunds should be ordered by the Commission and/or the categories of transactions subject to refund, those issues are severed from petitions 01-71051, et al., without prejudice to the parties raising the issues in the petitions that have been stayed, provided the issue(s) have been properly preserved in the stayed petition(s).

(3) Briefing: The supplemental certified index to the record has been filed.

3(a) Opening Briefs: Petitioners' and petitioner-intervenors' opening briefs are due December 23, 2004.

In the Jurisdictional Cases, the following petitioners are granted leave to file a joint brief not to exceed the stated word count:

The Public Entities Group's opening brief shall not exceed 21,000 words.

In the Scope/Transactions Cases, the following petitioners are granted leave to file a joint brief not to exceed the stated word count:

The California Parties' opening brief shall not exceed 28,000 words.

The Competitive Supplier Group's opening brief shall not exceed 20,000 words.

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The Public Entities Group's opening brief shall not exceed 20,000 words.

Duke Energy's opening brief shall not exceed 14,000 words.

APX's opening brief shall not exceed 14,000 words.

The City of San Diego's opening brief shall not exceed 14,000 words.  
All petitioners' briefs shall have blue covers.

Any petitioner-intervenor briefs filed in the Jurisdictional Cases or in the Scope/Transactions Cases shall not exceed 14,000 words and shall have green covers.

3(b) Respondent's Briefs: Respondent's briefs are due January 31, 2005. The two briefs (on jurisdiction and scope/transactions) collectively shall not exceed 65,000 words and shall have red covers.

3(c) Respondent-Intervenors' Briefs: The briefs of any intervenor that wishes to support respondent and any nonaligned intervenor are due February 9, 2005, and shall have green covers.

3(d) Reply Briefs: The reply briefs are due March 1, 2005, and shall respond to all previously submitted arguments. The length of each party's or group's brief shall be one-half of the length of its opening brief. Petitioners' reply briefs shall have grey covers, and petitioner-intervenors' reply briefs shall have green covers.

No motion to enlarge the length or due dates for any brief will be entertained.

(4) Substitution: If a petitioner voluntarily dismisses a petition designated for briefing with the result that a claim advanced by another party will not be argued in the cases being briefed, another party raising the issue in one of the stayed cases may move to substitute its petition for the case being dismissed.

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(5) Motions to Supplement/Correct the Record: Any motions to supplement or correct the record and/or requests for judicial notice will be referred to us for resolution. The party submitting the motion or request may provisionally refer to the proposed supplementation/correction or material to be judicially noticed with the understanding that we may strike any such references if we decline to grant the motion or request. The pendency of any motion to supplement/correct the record or request for judicial notice will not suspend briefing.

(6) Motions to Strike: Any motions to strike portions of a brief or excerpts shall be referred to us for resolution. The pendency of any motion to strike will not suspend briefing.

(7) Friend of the Court Briefs: Any application to file a friend of the court brief must be accompanied by the proposed brief. The application and any response will be referred to us for resolution. No proposed brief shall exceed 7,000 words. We will scrutinize any such application closely and will only grant such requests if we are convinced the brief will be of exceptional assistance. The pendency of an application to file a friend of the court brief will not suspend briefing.

(8) Service: The parties shall file an original and fifteen copies of each brief. All briefs shall be served by overnight mail on the other parties; alternatively, the parties may consent to electronic service pursuant to Circuit Rule 25-3.3, or may accomplish service by another mutually agreed-upon method. Excerpts of record, supplemental excerpts, and further excerpts shall accompany the briefs pursuant to Circuit Rule 17-1. The parties shall file three hard copies and four CD-ROM versions of the excerpts of record. The parties shall file the Commission orders as a separate set of excerpts to be used in both the Jurisdictional Cases and the Scope/Transactions cases.

(9) Oral Argument: Oral argument is scheduled for April 12, 2005, for the Jurisdictional Cases and April 13, 2005, for the Scope/Transactions Cases, in San Diego, California. The times and specific location will be announced at a later date.

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(10) Pending Motions: The motions of Bonneville Power Administration and the Arizona Electric Power Cooperative for amendment of the court's October, 22, 2004, order, is denied as unnecessary, in light of the inclusion of petitions 02-70262 and 03-70185 in the cases severed for briefing. The motions of the Indicated Energy Sellers and the Cogenerators for clarification or amendment of the court's October 22, 2004, order, are denied. Due process challenges to the Commission's categories of transactions subject to refund shall not be briefed in these petitions.

(11) Previously Filed Briefs: All briefs previously filed in any of the previously consolidated cases 01-71051, et al., are stricken without prejudice to renewal of the arguments contained therein in the Jurisdictional Cases and/or Scope/Transaction Cases, and/or in newly consolidated cases 01-71934, et al.

(12) Previous Orders: All orders regarding intervention in previously consolidated cases 01-71051, et al., apply to the Jurisdictional Cases and to the Scope/Transactions Cases.

(13) Motions for Reconsideration, et al.: Any motion for reconsideration, rehearing, clarification or modification of this order is strongly disfavored.